

FILED

JAN 12 2011

PATRICK E. DUFFY, CLERK

By DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

MICHAEL P. DUNSMORE,)	CV 10-04-H-DWM-RKS
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
DR. MICHAEL O'NEILL,)	
)	
Defendant.)	
_____)	

Defendant Dr. Michael O'Neill filed a Motion to Dismiss with Prejudice on November 15, 2010. United States Magistrate Judge Keith Strong entered Findings and Recommendation on December 8, 2010 and recommended dismissing Dunsmore's complaint pursuant to Rule 25 for failure to substitute a proper party in this case. Plaintiff did not timely object to the Findings and Recommendation and has therefore waived the right to de novo review of the

record. 28 U.S.C. § 636(b)(1). This Court will review the Findings and Recommendation for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a “definite and firm conviction that a mistake has been committed.” United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

A court may order substitution of a proper party if a party dies and the claim is not extinguished. Fed. R. Civ. P. 25. October 4, 2010 the Court ordered plaintiff to substitute the proper party after a notice of Dr. Michael O’Neill’s death was filed. There has been no motion for substitution of the parties and no response to the motion to dismiss by the Plaintiff.

After a review of Judge Strong’s Findings and Recommendation, I find no clear error. Accordingly,

IT IS HEREBY ORDERED that Judge Strong’s Findings and Recommendation (dkt #50) are adopted in full. Defendant’s Motion to Dismiss (dkt #49) is GRANTED to the extent Dunsmore’s Complaint (dkt # 2) is DISMISSED WITHOUT PREJUDICE.

The Clerk of Court is directed to enter judgment in compliance with Rule 58, Fed. R. Civ. P., and to close this case.

The Clerk of Court is further directed to have the docket reflect that the

Court certifies pursuant to 24(a)(3)(A), Fed.R.App.P., that any appeal of the decisions in this case would not be taken in good faith.

Dated this 12th day of January, 2011.



Donald W. Molloy, District Judge
United States District Court